Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–33 OF 1999
AUGUSTINE PAUL J
16 NOVEMBER 1999

Criminal Procedure *— Habeas corpus — Detention of drug dependant — Application for habeas corpus — Finding by rehabilitation officer that applicant took drugs once in a while — Recommendation made by officer that applicant be detained in rehabilitation centre for a period of two years — Order for detention made by magistrate — Whether applicant a drug dependant under Drug Dependants (Treatment and Rehabilitation) Act 1983 — Whether recommendation of rehabilitation officer wrong in law — Whether magistrate ought to have acted on recommendation — Whether detention order liable to be set aside*

Criminal Procedure *— Habeas corpus — Detention of drug dependant — Definition of drug dependant — Whether includes person who takes drugs once in a while — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 2*

Criminal Procedure *— Habeas corpus — Detention of drug dependant — Detention under Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6 — Certificate issued by government medical officer, effect of — Recommendation of rehabilitation officer, effect of*

Evidence *— Documentary evidence — Public document — Whether report of rehabilitation officer and certificate of government medical doctor issued under Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6 are public documents — Whether document may constitute a public document even in absence of right to inspect document — Evidence Act 1950 ss 74 & 76*

Evidence *— Documentary evidence — Report of responsible officer based on investigations — Report made under authority of statute — Whether admissible under Evidence Act 1950 s 35 — Probative value of such report — Whether report rebuttable by other evidence*

Evidence *— Documentary evidence — Recommendation of rehabilitation officer — Whether an expression of opinion — Whether recommendation admissible under Evidence Act 1950 s 35 — Probative value of recommendation — Whether recommendation rebuttable by other credible evidence*

The applicant by way of notice of motion prayed for an order that a writ of habeas corpus be issued against the respondents to produce him before the High Court to be released. The facts revealed that the applicant had been ordered to be detained by a magistrate for a period of two years in accordance with s 6(1)(a) ('the section') of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant had been certified to be a drug dependant pursuant to a certificate ('the certificate') issued by a government medical officer in the prescribed form. In ordering the detention, the magistrate had acted in accordance with the recommendation made by the rehabilitation officer ('the recommendation') made in para 4 of the

officer's report ('the report'). Counsel for the applicant contended that: (i) the magistrate had erred in accepting the recommendation as it did not take relevant matters into consideration; (ii) the recommendation that the applicant be detained for two years pursuant to the section was not supported by extracts from the report; and (iii) the findings of the rehabilitation officer showed that the applicant was not a drug dependant as defined by s 2 of the Act. In reply, the senior federal counsel contended that: (a) the applicant had been certified to be a drug dependant by a government medical officer after the necessary tests were carried out; (b) the report was independent of the certification of the government medical officer and should not be considered to determine whether the applicant was a drug dependant; (c) the object of the report was only for the purpose of making a recommendation to the magistrate which the magistrate followed; and (d) the magistrate had not erred in making the order. In making its ruling, the High Court had to, inter alia, consider the nature and effect of the documents referred to under s 6, namely: (i) a certification by a government medical officer or registered medical practitioner that a person is a drug dependant; and (ii) the recommendation by a rehabilitation officer.

Held, allowing the application:

(1) The certification by a government medical officer or registered medical practitioner is the only authority for producing a person before a magistrate. The magistrate makes an order under s 6 of the Act only upon consideration of the recommendation. It is implicit that in making the recommendation, the rehabilitation officer takes into account the certificate issued by the medical officer (see p 73B–C).

(2) As the report and the certificate were prepared by public servants in the discharge of their official duties, they were public documents as defined in s 74 of the Evidence Act 1950. Section 76 of the Evidence Act 1950 however contemplates a class of public documents which persons do not have the right to inspect with the result that it does not require the condition of public access to the document to render it a public one. Thus, even when a right to inspect is not permitted, a document may be a public document (see pp 73E–F, 74B–C).

(3) The admissibility of non-judicial public documents governed by s 35 of the Evidence Act 1950 does not depend upon personal knowledge of their maker. The admissibility of a document is one thing and its probative value another. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. A public document is therefore prima facie proof of its contents but may be rebutted by other evidence. On the facts, the report, being a document prepared by a public servant in the discharge of his official duty, was admissible under s 35. The certificate was also admissible on

similar principles. Where a report is prepared by a responsible officer based on investigations by him and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight. However, such document may be rebutted by other evidence (see pp 74E–F, 75H–76A).

(4) The recommendation, which was part of the report, was an expression of opinion. The recommendation was not admissible under s 35 as it was an inference drawn by the rehabilitation officer based on enquiries conducted by him. Nevertheless, the recommendation had been made admissible statutorily by s 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983. The probative value of the recommendation depended on whether s 6 made the recommendation conclusive in which event it could not be challenged. A reading of s 6 revealed that upon a consideration of the recommendation a magistrate shall make one of two orders. The magistrate is therefore not bound to follow the recommendation of the rehabilitation officer and may ignore the recommendation in an appropriate case. The recommendation is therefore not made conclusive by s 6 and other credible evidence is admissible to challenge the recommendation (see p 76A–G).

(5) A drug dependant is defined under the Drug Dependants (Treatment and Rehabilitation) Act 1983 as a person who, inter alia, has the '... compulsion to take the drug on a continuous or periodic basis ...'. The definition of a drug dependant under the Drug Dependants (Treatment and Rehabilitation) Act 1983 does not include a person who takes drugs once in a while, as per the finding of the rehabilitation officer in the instant case. This finding negated the inference that the applicant had a compulsion to take drugs on a continuous or periodic basis. The prima facie evidence that the applicant was a drug dependant had therefore been rebutted. The recommendation made by the rehabilitation officer that the applicant be detained for a period of two years pursuant to s 6(1)(a) was therefore wrong in law and the magistrate ought not to have acted on it. The magistrate had acted in a mechanical manner without applying his mind to the facts before making the order and this made the order liable to be set aside and the applicant set free (see p 77A–D).

[Bahasa Malaysia summary

Pemohon melalui notis usul memohon satu perintah agar satu writ habeas corpus dikeluarkan terhadap responden-responden bagi mengemukakan beliau di hadapan Mahkamah Tinggi untuk dibebaskan. Fakta-fakta mendedahkan bahawa pemohon telah diperintahkan untuk ditahan oleh majistret bagi tempoh dua tahun menurut s 6(1)(a) ('seksyen tersebut') Akta Penagih Dadah (Rawatan dan Pemulihan) 1983. Pemohon telah disahkan seorang penagih dadah

berdasarkan satu sijil ('sijil tersebut') yang telah dikeluarkan oleh seorang pegawai perubatan kerajaan di dalam borang yang telah ditetapkan. Dengan memerintahkan tahanan tersebut, majistret telah bertindak menurut cadangan yang diberikan oleh pegawai pemulihan itu ('cadangan tersebut') yang dinyatakan pada perenggan 4 kepada laporan pegawai itu ('laporan tersebut'). Peguam pemohon telah menegaskan bahawa: (i) majistret telah membuat kesilapan di dalam menerima cadangan tersebut kerana ia tidak mengambil kira perkara-perkara relevan yang perlu dipertimbangkan; (ii) cadangan tersebut bahawa pemohon ditahan selama dua tahun berdasarkan seksyen tersebut tidak disokong oleh petikan daripada laporan tersebut; dan (iii) penemuan-penemuan oleh pegawai pemulihan itu menunjukkan bahawa pemohon bukan seorang penagih dadah sepertimana ditafsirkan di dalam s 2 Akta tersebut. Sebagai jawapan, peguam kanan persekutuan menegaskan bahawa: (a) pemohon telah disahkan seorang penagih dadah oleh seorang pegawai perubatan kerajaan selepas ujian-ujian yang perlu dijalankan; (b) laporan tersebut adalah bebas daripada pengesahan pegawai perubatan kerajaan itu dan hendaklah tidak disifatkan sebagai penentu sama ada pemohon adalah seorang penagih dadah; (c) tujuan laporan tersebut adalah hanya bagi tujuan memberikan cadangan kepada majistret yang telah diikuti oleh majistret; dan (d) majistret tidak membuat kesilapan di dalam membuat perintah itu. Di dalam membuat keputusan, Mahkamah Tinggi telah, antara lain, mempertimbangkan sifat dan akibat dokumen-dokumen yang dirujuk di bawah s 6, terutamanya: (i) satu pengesahan oleh seorang pegawai perubatan kerajaan atau pengamal perubatan berdaftar bahawa seseorang itu adalah seorang penagih dadah; dan (ii) cadangan tersebut oleh seorang pegawai pemulihan.

Diputuskan, membenarkan permohonan tersebut:

(1) Pengesahan oleh pegawai perubatan kerajaan atau pengamal perubatan berdaftar merupakan satu-satunya kuasa untuk mengemukakan seseorang di hadapan seorang majistret. Majistret membuat perintah di bawah s 6 Akta tersebut hanya setelah mempertimbangkan cadangan tersebut. Adalah tersirat bahawa di dalam membuat cadangan tersebut, pegawai pemulihan itu mengambil kira pengesahan yang dikeluarkan oleh pegawai perubatan itu (lihat ms 73B–C).

(2) Memandangkan laporan dan sijil tersebut telah disediakan oleh seorang kakitangan awam di dalam menjalankan tugas-tugas rasmi mereka, laporan dan sijil tersebut merupakan dokumen-dokumen awam seperti mana yang ditafsirkan di dalam s 74 Akta Keterangan 1950. Seksyen 76 Akta Keterangan 1950 bagaimana pun membayangkan satu kelas dokumen-dokumen awam di mana seseorang tidak mempunyai hak untuk memeriksa dengan akibat bahawa ia tidak memerlukan suatu keadaan di mana terdapat akses awam bagi manjadikan ia suatu yang umum. Oleh

itu, walaupun hak untuk memeriksa tidak dibenarkan, suatu dokumen masih boleh merupakan suatu dokumen awam (lihat ms 73E–F, 74B–C).

(3) Kebolehterimaan dokumen-dokumen awam yang sub-judicial yang dikawal oleh s 35 Akta Keterangan 1950 tidak bergantung kepada pengetahuan peribadi pembuatnya. Kebolehterimaan suatu dokumen merupakan satu perkara dan nilai probatifnya adalah satu perkara lain. Suatu dokumen mungkin boleh terima dan mungkin tidak boleh membawa kepada apa-apa sabitan dan beban nilai probatifnya mungkin tiada. Suatu dokumen awam, oleh demikian, adalah bukti prima facie akan kandungannya tetapi boleh disangkal oleh keterangan lain. Berdasarkan fakta-fakta, laporan tersebut, suatu dokumen yang disediakan oleh seorang kakitangan awam yang menjalankan tugas-tugas rasmi beliau, adalah boleh terima di bawah s 35. Sijil tersebut juga boleh terima atas prinsip-prinsip yang sama. Di mana suatu laporan disediakan oleh seorang pegawai yang bertanggungjawab berdasarkan siasatan oleh beliau dan mempunyai pengaruh statutori di mana ia diberikan bukan hanya oleh seorang pegawai pentadbir tetapi di bawah kuasa suatu statut, nilai probatifnya akan menjadi tinggi bagi membolehkannya diberi nilai yang tinggi. Bagaimanapun, dokumen sedemikian mungkin disangkal oleh keterangan lain (lihat ms 74E–F, 75H–76A).

(4) Cadangan tersebut, yang merupakan sebahagian daripada laporan tersebut, adalah satu penyataan pendapat. Cadangan tersebut tidak boleh terima di bawah s 35 oleh kerana ia adalah suatu inferens oleh pegawai pemulihan itu berdasarkan siasatan yang dijalankan oleh beliau. Walau bagaimanapun, cadangan tersebut telah dijadikan boleh terima secara statut oleh s 6 Akta Penagih Dadah (Rawatan dan Pemulihan) 1983. Nilai probatif cadangan tersebut bergantung sama ada s 6 menjadikan cadangan tersebut konklusif di mana, sekiranya demikian, ia tidak boleh dicabar. Dengan membaca s 6 mendedahkan bahawa dengan satu pertimbangan cadangan tersebut, majistret hendaklah membuat satu daripada dua perintah. Majistret, oleh itu, tidak terikat untuk mengikut cadangan tersebut oleh pegawai pemulihan itu dan boleh tidak menghiraukan cadangan tersebut di dalam kes yang bersesuaian. Cadangan tersebut, oleh demikian, tidak dijadikan konklusif oleh s 6 dan keterangan lain yang boleh dipercayai boleh diterima untuk mencabar cadangan tersebut (lihat ms 76A–G).

(5) Seorang penagih dadah ditafsirkan di bawah Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 sebagai seorang yang, antara lain mempunyai '... dorongan nafsu yang kuat untuk mengambil dadah pada suatu dasar yang berterusan atau berkala ...'. Tafsiran seorang penagih dadah di bawah Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 tidak termasuk seorang yang mengambil dadah sekali sekala, sebagaimana penemuan pegawai pemulihan di dalam kes ini. Penemuan ini menidakkan inferens bahawa

pemohon mempunyai dorongan nafsu yang kuat untuk mengambil dadah pada suatu dasar yang berterusan atau berkala. Keterangan prima facie bahawa pemohon adalah seorang penagih dadah oleh demikian disangkal. Cadangan tersebut yang dibuat oleh pegawai pemulihan itu menurut s 6(1)(a) oleh demikian adalah salah di sisi undang-undang dan majistret sepatutnya tidak bertindak sedemikian. Majistret telah bertindak secara mekanikal tanpa mengaitkan fikiran beliau dengan fakta-fakta sebelum membuat perintah itu dan ini menjadikan perintah itu boleh diketepikan dan pemohon dibebaskan (lihat ms 77A–D).]

Notes

For cases on detention of drug addict, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1513–1516.

For cases on documentary evidence generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.

For cases on public document, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 754–760.

Cases referred to

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156 (refd)

Anthony Gomez v Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 (refd)

Baldeo Das v Gobind Das ILR 36 All 161 (refd)

Buddhadasa v Mahendran (1956) 58 NLR 8 (refd)

Chua Lee Huat v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 2 MLJ 39 (refd)

Datuk James Wong Kim Min, Re [1976] 2 MLJ 245 (refd)

Doe v Andrews (1850) 15 QB 756 (refd)

Ghanava v Mehtab AIR 1934 Lah 890 (refd)

Juddery v Lindsay (1976) 8 ACTR 1 (refd)

Kamaruzamman bin Yahya v Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 5 MLJ 256 (refd)

Krishna Nanda v The State AIR 1958 Pat 166 (refd)

Kumar Digambar Singh v Ahmed Sayeed Khan AIR 1914 PC 11 (refd)

Lekhraj Kuer v Mahpal Singh ILR 5 Cal 744 (refd)

Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application [1993] 3 MLJ 673 (refd)

PP v Koh Yoke Koon [1988] 2 MLJ 301 (refd)

Pramanik v Ghose AIR 1940 Cal 187 (refd)

Rasipuran UMS Ltd v Commissioner of Income Tax AIR 1957 Mad 151 (refd)

Saxe v Kellett [1970] VR 600 (refd)

State of Bihar v Radha Krishna Singh AIR 1983 SC 684 (refd)

Sturla v Freccia (1880) 5 AC 623 (refd)

Union of India v Nand Kishore AIR 1966 HP 54 (refd)

Warren, Re (1870) 4 SALR 25 (refd)

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 2, 6(1)(a)
Evidence Act 1950 ss 35, 74, 76

Harcharanjit Singh (*Harcharanjit Singh & Associates*) for the applicant.
Tuan Haji Mohd Fauzi bin Mohd Nasir (Federal Counsel) for the respondents.

Augustine Paul J: By this notice of motion dated 19 August 1999 Gopinathan a/l Subramaniam ('the applicant') prayed for an order that a writ of habeas corpus be issued to the respondents to produce him before this court to be released. The applicant had been ordered to be detained for a period of two years on 19 March 1999 by the learned magistrate, Kuala Kubu Bharu at the Pusat Serenti Raub, Pahang in accordance with s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). Section 6 of the Act shall hereafter be referred to as 'the section'. The applicant had been certified to be a drug dependant pursuant to a certificate ('the certificate') issued by a government medical officer in the prescribed form, the material parts of which read as follows:

> Saya, DR SYED MOHD REDHA BIN SYED NASIR seorang *pegawai perubatan kerajaan/pengamal perubatan berdaftar, setelah menjalankan ujian-ujian yang perlu ke atas GOPINATHAN A/L SUBRAMANIAM Kad Pengenalan No 790327-14-5551 berumur 20 tahun yang beralamat di NO 20 KG SRI TERATAI, RAWANG. memperakui bahawa dia *ialah /xxxx seorang penagih dadah mengikut pengertian Akta. **Dadah/dadah-dadah berbahaya yang digunakan yang menyebabkan dia menjadi seorang penagih dadah ialah CANNABIS.

In making the order, the learned magistrate had acted in accordance with the recommendation ('the recommendation') in para 4 of the report ('the report') of the rehabilitation officer which reads as follows:

> 4 Syor Pegawai Pemulihan
>
> Adalah disyorkan supaya penama dimasukkan ke dalam pusat pemulihan selama dua tahun dan kemudian menjalani perintah pengawasan polis selama dua tahun mengikut Seksyen 6(1)(a) Akta Penagih Dadah 1983 (Pindaan) 1998.

In his argument before me learned counsel for the applicant contended, inter alia, that the learned magistrate erred in accepting the recommendation as it did not take relevant matters into consideration. Learned counsel said that the recommendation that the applicant be detained for a period of two years pursuant to subsection 6(1)(a) of the section is not supported by the following extracts from the report:

> 2.4 *Rekod Penggunaan Dadah*
>
> 2.4.1 Jenis Dadah: Ganja
> 2.4.2 Lama Menggunakan Dadah: 1 thn
> Tarikh Mula: 1998
> 2.4.3 Cara Pengambilan Dadah: Balut
> 2.4.4 Kekerapan Menggunakan Dadah: Sekali sekala
> 2.4.5 Perbelanjaan Menggunakan Dadah:

3 *Rumusan Di Atas Keseluruhan Latar Belakang Penagih*: (Untuk menentukan cara pemulihan yang sesuai) A

Penama berumur 20 thn, masih bujang dan kini tinggal bersama ibunya. Penama bekerja sebagai pemandu lori dengan pendapatan RM25/hari.

Penama mengaku menghisap dadah jenis ganja dengan cara balut. Penama telah terlibat dengan dadah sejak tahun 1997. Kekerapan menghisap adalah sekali sekala. B

Penama kini dalam perintah pengawasan dari tempoh 3/6/1997 hingga 3/6/1999 oleh Mahkamah Majistret Ampang. Penama gagal hadir melapur diri lansung sepanjang tempoh tersebut.

Learned counsel concluded by saying that these findings of the rehabilitation officer show that the applicant is not a drug dependant as defined by s 2 of the Act as follows: C

> 'drug dependant' means a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterised by behavioural and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence; ... . D

In his reply, the learned senior federal counsel said that the applicant has been certified to be a drug dependant by a government medical officer after the necessary tests were carried out. He added that the report is independent of the certification of the government medical officer and should not be considered to determine whether the applicant is a drug dependant. The object of the report, he said, is only for the purpose of making a recommendation to the magistrate which he followed. Accordingly, the learned magistrate had not erred in making the order. E

As the principal complaint of the applicant is that the order made by the learned magistrate is wrong in law it is necessary to set out the section under which he made the order. It reads as follows: F

> (1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations — G
>
> (a) order such person to undergo treatment and rehabilitation at a rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or H
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

In order to make a ruling on the rival contentions raised by both parties, it is necessary to consider the nature and effect of the documents referred to in the section. They are: I

A (a) a certification by a government medical officer or registered medical practitioner that a person is a drug dependant; and

(b) the recommendation by a rehabilitation officer.

Upon a certification by a government medical officer or registered medical practitioner that a person is a drug dependant that person shall be produced B before a magistrate. Thus the certification is only authority for producing a person before a magistrate. The magistrate shall then make an order under the section upon the recommendation of the rehabilitation officer. It follows that the document that the magistrate considers in making the appropriate order is the recommendation. It is therefore implicit that in making the recommendation the rehabilitation officer will take into account the C certificate issued by the medical officer. I venture to suggest that the certificate by the medical officer will be based on physical tests carried out by him while a rehabilitation officer's recommendation will have the added psychological report on the person based on inquiries made. The recommendation of the rehabilitation officer therefore plays a dominant D role as it is based on this that the magistrate makes the order. The magistrate must make an order under subsection (1)(a) or (b) of the section upon a consideration of the recommendation. The argument advanced by both parties depends on whether the magistrate is bound by the recommendation.

That leads to the question of whether the certificate and the E recommendation which comes with the report can be challenged. This would depend on the rules of relevancy of the certificate, the report and the recommendation incorporated into it.

As the report and the certificate were prepared by public servants in the discharge of their official duties they are public documents as defined in s 74 F of the Evidence Act 1950 ('s 74'). I interpolate to add that our definition of a 'public document' is wider than the English law definition. In *Sturla v Freccia* (1880) 5 AC 623 Lord Blackburn, in defining a 'public document' under English law, said at p 643:

> But it must be a public document, and it must be made by a public officer. I G understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire ... . I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

The dictum of Lord Blackburn received attention in *Buddhadasa v* H *Mahendran* (1956) 58 NLR 8, a Sri Lanka case where the law relating to public documents is similar to ours. In commenting on the distinction in this area of the law between the English and the Sri Lankan law Weerasooriya J said at pp 11–12:

> The conception of a public document in English law and our law is, therefore, I fundamentally different, and in determining whether under our law a person has a right of inspection of a public document it would, in the absence of statutory provision conferring such a right, be unsafe to adopt the criterion of the English Common Law ... .

It must be noted that s 76 of the Evidence Act 1950 ('s 76') which requires certified copies to be given of public documents applies only to documents ' ... which any person has a right to inspect'. It has been held that the right to obtain certified copies depends on the right to inspect (see *Rasipuran UMS Ltd v Commissioner of Income Tax* AIR 1957 Mad 151; *Pramanik v Ghose* AIR 1940 Cal 187). This right may be conferred by statute or may even arise when a person has an interest in it (see *Anthony Gomez v Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24). Section 76 therefore contemplates a class of public documents which persons do not have the right to inspect with the result that it does not require the condition of public access to the document to render it a public one as enunciated in *Sturla v Freccia* (1880) 5 AC 623. It follows that even when a right to inspect is not permitted a document may be a public document under our law. Thus the definition of 'public document' in s 74 does not recognise the reason given by Lord Blackburn as a basic condition for public documents.

The admissibility of non-judicial public documents is governed by, inter alia, s 35 of the Evidence Act 1950 ('s 35') which reads as follows:

> An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

The admissibility of documents under s 35 does not depend upon personal knowledge of their maker (see *Doe v Andrews* (1850) 15 QB 756). It must be remembered that admissibility of a document is one thing and its probative value quite another — these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil (see *State of Bihar v Radha Krishna Singh* AIR 1983 SC 684). With regard to the probative value of public documents I refer to *Lekhraj Kuer v Mahpal Singh* ILR 5 Cal 744 where their Lordships of the Privy Council observed at p 752:

> When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. The mere fact then that the settlement records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves.

A public document is therefore prima facie proof of its contents but may be rebutted by other evidence (see *Kumar Digambar Singh v Ahmed Sayeed Khan* AIR 1914 PC 11). This is succinctly explained by RA Brown in his book entitled *Documentary Evidence in Australia* at p 67 in the following words:

> As a general principle, a public document produced from proper custody, or a certified copy thereof, is evidence of its contents (see *Wilton & Co v Phillips* (1903) 19 TLR 390). There is no need to provide other verification as to the accuracy of the documents' contents, although they can be impeached by

other evidence (see *Irish Society v Bishop of Derry* (1846) 12 CI & F 641; 6 ER 1561). In keeping with the usual approach to documentary evidence, the fact that a public document can readily be admitted in evidence should have little bearing on the weight that may ultimately be attached to the material it contains by the court. In *Wilton & Co v Phillips* (1903) 19 TLR 390, Phillimore J rather bluntly stated:

> 'A public document coming from the proper place or a certified copy of it is sufficient proof of every particular stated in it.'

Although this statement would appear to place considerable evidentiary weight on the contents of a public document, it is quite clear that when his Lordship used the phrase 'sufficient proof' he meant nothing more than 'sufficient in the absence of other credible evidence to the contrary', and even this restriction overstates the evidentiary value of such documents (see *Re Stollery; Weir v Treasury Solicitor* [1926] Ch 284 (CA)).

Thus the certificate will be of little evidentiary value if there is other evidence to rebut what it asserts. As Blackburn J said in *Juddery v Lindsay* (1976) 8 ACTR 1:

> By their nature, certificates cannot be weighed. They say nothing except the facts which they literally record. There may be an inference which the statute allows to be drawn from those facts, but where there is other credible evidence on the issue to which they relate, that inference cannot be drawn, because the other evidence can be weighed and the certificate cannot. The certificate then says nothing of any weight on the issue to which the statutory inference relates.

Such other evidence may be adduced by the party prosecuted or from the evidence tendered by the prosecution itself. This was made clear by Anderson J in *Saxe v Kellett* (1970) VR 600 at p 602:

> When the defence is entered upon and there is other evidence before the court besides the certificate — whether it comes solely from the defendant's witnesses, or from evidence which may have been available to the defendant in the course of the informant's case, is immaterial — when there is further evidence besides the certificate, the certificate loses much of its strength and force.

Having dealt with the law relating to s 35 and the evidentiary value of documents admitted thereunder I shall now consider the admissibility of the report, the certificate and the recommendation under that section. The report contains the result of investigations carried out by the Rehabilitation Officer. Although s 35 refers to a book, register or other official record it has been held that that section also applies to a report if it is proved to have been prepared by a public servant in the discharge of his official duty or by another person in the performance of a legal duty (see *Krishna Nanda v The State* AIR 1958 Pat 166; *Baldeo Das v Gobind Das* ILR 36 All 161). Thus the report, being a document prepared by a public servant in the discharge of his official duty, is admissible under s 35. The certificate is also admissible on similar principles. Where a report is prepared by a responsible officer based on investigations by him and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight (see *State of Bihar v Radha Singh* AIR 1983 SC 684). However,

as I have mentioned earlier, these documents can be rebutted by other evidence. The admissibility of the recommendation which is part of the report is another matter as it is an expression of an opinion. It has been held that the words 'an entry' in s 35 do not apply to the opinions of public servants based on, or inferences drawn from allegations made before them in the course of enquiries, but are confined only to such statements of facts in issue or relevant facts as are made by the public servants concerned in the course of their official duty (see *Ghanava v Mehtab* AIR 1934 Lah 890; *Union of India v Nand Kishore* AIR 1966 HP 54). The recommendation is therefore not admissible under s 35 as it is an inference drawn by the rehabilitation officer based on enquiries conducted by him. Be that as it may, the recommendation has been made admissible statutorily by the section. So its admissibility creates no problem. With regard to its probative value, I shall consider whether the section itself makes the recommendation conclusive in which event it cannot be challenged. When a document is made conclusive evidence of some fact, it is clear that the legislative intention is that the documents should absolutely settle that fact for all purposes, so that evidence in contradiction of the documented fact is rendered irrelevant (see *Re Warren* (1870) 4 SALR 25). The conclusiveness of the recommendation will depend upon whether the magistrate is bound to follow it. If the magistrate is bound to follow it then it cannot be challenged. In that event the argument advanced by learned counsel for the applicant cannot be sustained as the magistrate will be obliged to follow the recommendation. A reading of the section reveals that upon a consideration of the recommendation a magistrate shall make one of two orders. This makes it patent that in making one of the two orders the magistrate is not bound to follow the recommendation of the rehabilitation officer. This means that, if the rehabilitation officer recommends an order under sub-s 1(a), the magistrate has the discretion to make an order under sub-s 1(b) of the section and vice versa. This results in the recommendation being ignored by the magistrate in an appropriate case. The recommendation made by the rehabilitation officer is therefore not conclusive. Thus in the absence of the section making the recommendation conclusive other credible evidence is admissible to challenge the recommendation. In any event it is settled law that in cases relating to detention without trial, as in cases of this nature, the applicable law must be strictly construed and in case of any doubt the court should lean in favour of the subject (see *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; *PP v Koh Yoke Koon* [1988] 2 MLJ 301). In this regard, reference may be made to *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245, where Lee Hun Hoe CJ (Borneo) said at p 251:

> The material provisions of the law authorising detention without trial must be strictly construed ... . Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.

Accordingly, the certificate and the recommendation must comply with the statutory requirements and may be rejected if there is no such compliance

as illustrated by *Kamaruzamman bin Yahya v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 5 MLJ 256.

The section contemplates the making of a recommendation only in the case of a drug dependant as defined by the Act. A drug dependant is defined in the Act as a person who, inter alia, has the ' ... compulsion to take the drug on a continuous or periodic basis ... .' This certainly does not include a person who takes drugs once in a while. And it is the finding of the Rehabilitation Officer that the applicant takes drugs once in a while. This negates the inference that the applicant has a compulsion to take the drug on a continuous or periodic basis. The prima facie evidence that the applicant is a drug dependant has therefore been rebutted. The applicant is thus not a drug dependant based on the report itself. The result is that the certificate loses much of its strength and force. In the premises the recommendation made by the Rehabilitation Officer is wrong in law and the learned Magistrate ought not to have acted on it. He has acted in a mechanical manner without applying his mind to the facts before making the order. This makes the order liable to be set aside and the applicant set free (see *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673; *Chua Lee Huat v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 2 MLJ 395). Accordingly, I allowed the application made by the applicant.

Application allowed.

Reported by Andrew Christopher Simon